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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1948

No. 631

WALTER E. ALLEN,
Petitioner,

VERSUS

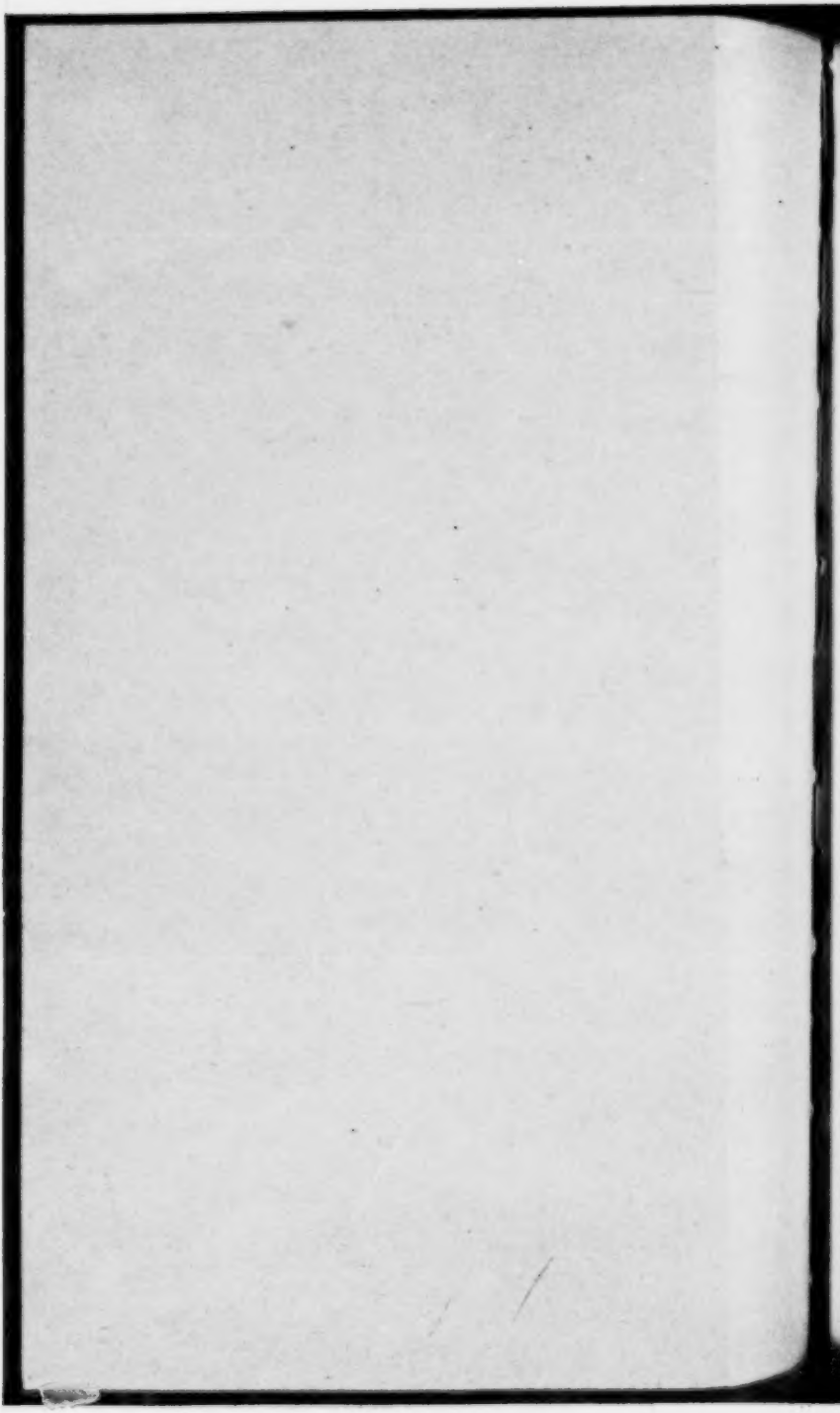
M. LUCILLE ALLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

LYNN ADAMS,
ROBERT E. SHELTON,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

MARCH 4, 1949.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-3909



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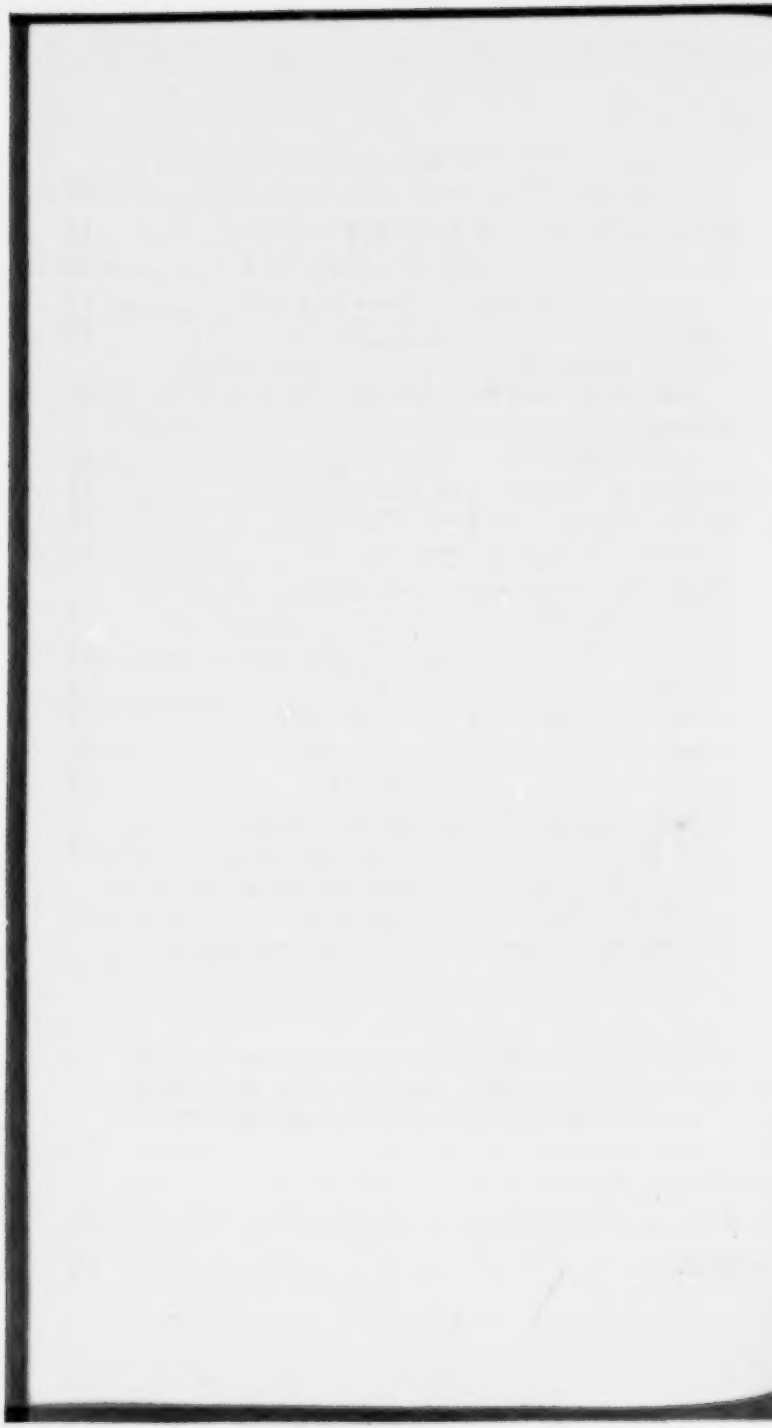

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1948

No.

WALTER E. ALLEN,
Petitioner,

VERSUS

M. LUCILLE ALLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

This petition for *certiorari* is based upon the refusal of the Oklahoma Supreme Court to accord full faith and credit to a judgment of the Nevada court, in a divorce proceedings, involving a property settlement. Four Justices of

the Oklahoma Supreme Court (Dissenting Opinion, Tr. 172) expressed the view urged here, that the judgment, being valid upon its face, and not shown to be void, the Oklahoma Courts were constitutionally bound to recognize it and give it full faith and credit.

Your petitioner, Walter E. Allen, therefore, prays that a writ of *certiorari* issue to the Supreme Court of the State of Oklahoma, to review the judgment of that court, entered September 21, 1948, not officially reported at this date (Tr. 124); Petition for Rehearing was denied December 9, 1948 (Tr. 148).

A Certified Transcript of the Record in this case, including the proceedings in the Supreme Court of the State of Oklahoma, is furnished herewith, in accordance with the rules of this Court.

JURISDICTION

The right to enforce a judgment recovered in a court of another State is one arising under Article IV, Section 1 of the Federal Constitution and under a statute of the United States, R. S., Section 905, 28 U.S.C.A. 687, and when a state court refuses credit to the judgment of a sister state, this Court is vested with jurisdiction to review the judgment of the state court refusing such credit under Section 237 of the Judicial Code, 43 Stat. 937, 28 U.S.C.A. 344.

Titus v. *Wallick*, 306 U.S. 282.

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SUMMARY STATEMENT OF MATTER INVOLVED

Your petitioner, Walter E. Allen, instituted divorce proceedings in the Second Judicial District Court, Washoe County, State of Nevada. The wife, M. Lucille Allen, filed her answer to the Nevada proceedings, and appeared by her attorney of record throughout the divorce proceedings. A property settlement between the parties was tendered and admitted in evidence, which pertinently provided: "This agreement shall be incorporated in the decree of divorce if and when the same is entered." The minutes of the Clerk show that in granting the decree of divorce, the Nevada court stated from the bench that the agreement between the parties shall "be approved, ratified and adopted" and "made a part of the decree." The Journal Entry, however, recited that "the agreement between the parties hereto, dated August 4, 1939, be, and it is hereby approved, adopted and confirmed by this court, and the parties hereto directed to comply therewith and to execute the terms thereof."

Petitioner, Walter E. Allen, moved to Oklahoma and thereafter became delinquent in the payments provided in the Nevada judgment. M. Lucille Allen brought suit in the District Court of Oklahoma County, Oklahoma, for arrearages, not on the judgment but on the property settlement contract. Petitioner interposed and pleaded the Nevada judgment in the divorce proceedings, as the basis of his legal liability, and the trial court sustained his contention and dismissed the action. The Supreme Court of the

State of Oklahoma reversed [*Allen* v. *Allen*, 162 Pac. (2d) 193], holding that the property settlement contract had not been legally extinguished by the divorce decree, but pointed out that if the Nevada court "had incorporated and adopted 'into' and had made said contract a literal part of the final decree" the finding of the trial court would have been sustained. The Case-Made was remanded, the trial court entered judgment for the arrearages, which were paid by petitioner.

Petitioner thereupon filed a motion in the Second Judicial District Court of Washoe County, Nevada, asking the Nevada court to make its judgment speak the truth *nunc pro tunc*. Upon consideration of the motion, and based upon his own knowledge and the records of the court, and without the aid of any extraneous evidence, the Nevada judge who had heard the divorce proceedings between the parties, entered an order *nunc pro tunc*, reciting the judgment he had previously and actually rendered in the divorce proceedings.

When the wife again brought suit *ex contractu* in the District Court of Oklahoma County, Oklahoma, for arrearages, petitioner pleaded the judgment of the Nevada court, as reflected by the *nunc pro tunc* order as the basis of his legal liability. The judgment *nunc pro tunc*, duly authenticated, as required by R. S., Sec. 905, 28 U.S.C.A. 687, was accepted in evidence.

THE DECISIONS BELOW

The District Court of Oklahoma County, Oklahoma, refused to give full faith and credit to the Nevada judg-

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ment, and without filing findings of fact and conclusions of law, entered judgment for the respondent, M. Lucille Allen on the contract (Tr. 53).

In affirming the judgment of the District Court, the Supreme Court of Oklahoma, refused to give full faith and credit to the Nevada judgment, stating in their opinion that the *nunc pro tunc* order was an amended judgment, changing the rights of the parties, and under Oklahoma and Nevada law, notice to the opposite or adverse party was a prerequisite to the Nevada court's jurisdiction to enter such order. The opinion and decision of the Supreme Court of the State of Oklahoma, affirming the district court's judgment has not yet been officially reported, but may be found at Pages 124 to 134, inclusive, of the Transcript of Record on file herein.

QUESTIONS PRESENTED

1. May the Oklahoma Supreme Court misconceive and misinterpret the Nevada judgment, and then under the guise of local procedural law refuse to accord such judgment full faith and credit?

2. Is the settlement contract void, and its enforcement repugnant to the due process clause of the Federal Constitution?

REASONS FOR GRANTING THE WRIT

Your petitioner believes that a writ of *certiorari* should be granted in this case for the reason that although peti-

tioner relied upon his Federal right to have his Nevada judgment recognized in the Oklahoma courts, the Oklahoma Supreme Court, under a misapprehension of the Nevada judgment and the guise of local procedural law, refused to accord the Nevada judgment the same faith and credit it had by law or usage in the courts of Nevada, as required by the Full Faith and Credit Clause of the Federal Constitution, Article IV, Section 1, and the Laws of the United States, R. S., Section 905, 28 U.S.C.A. 687. When a Federal right has been specially set up and claimed in a state court, it is the province of this Court to inquire not only whether it was denied in express terms, but also whether it was denied in substance and effect.

Norris v. *Alabama*, 294 U.S. 587;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U.S. 737, 745;

Aetna Life Ins Co. v. *Dunkin*, 266 U.S. 379, 394.

PRAYER

Wherefore, your petitioner respectfully prays that this Court, as the final arbiter of questions arising under the Full Faith and Credit Clause of the Constitution, issue a writ of *certiorari* to the Supreme Court of the State of Oklahoma, to the end that this cause may be reviewed and determined by this Court; that the decree of the Oklahoma Supreme Court be reversed and that petitioner be granted such other and further relief as may be proper.

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Respectfully submitted,

WALTER E. ALLEN, *Petitioner,*
LYNN ADAMS,
ROBERT E. SHELTON,
Attorneys for Petitioner.

CERTIFICATE

We, counsel for petitioners, hereby certify that we have examined the foregoing petition and that in our opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

LYNN ADAMS,

ROBERT E. SHELTON,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

MARCH 4, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The District Court of Oklahoma County, Oklahoma, made no findings of fact or conclusions of law; its judgment is found at Page 53 of the Transcript of Record. The opinion of the Supreme Court of the State of Oklahoma

has not yet been officially reported, but is found at Pages 124 to 134, inclusive, in the Transcript of Record.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered September 21, 1948 (Tr. ....). This Court's jurisdiction is found in Section 237 of the Judicial Code, as amended, 43 Stat. 937, 28 U.S.C.A. 344.

STATEMENT OF THE CASE

The statement of facts as recited in the preceding petition under the heading "Summary Statement of the Matter Involved," is sufficient for an understanding of the grounds urged for the allowance of the writ, and that statement of the facts is hereby adopted and made a part of this brief.

SPECIFICATIONS OF ERRORS

The Oklahoma Supreme Court misconceived and misinterpreted the Nevada judgment, and then under guise of local procedural law refused to accord such judgment full faith and credit.

The settlement contract is void, and its enforcement by the Oklahoma Supreme Court is repugnant to the due process clause of the Federal Constitution.

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ARGUMENT

The Oklahoma Supreme Court misconceived and misinterpreted the Nevada Judgment, and then under the guise of local procedural law refused to accord such Judgment full faith and credit.

The Oklahoma Supreme Court treated the *nunc pro tunc* order as modifying, changing and amending the original judgment of the court. On that basis it held that notice was jurisdictional.

At the outset we concede the Oklahoma law, reaffirmed in this case, to the effect that notice to interested parties is a jurisdictional prerequisite to the validity of a corrected, modified or amended judgment, and that in the absence of a showing to the contrary, the Nevada law would be the same as the law of Oklahoma. This being so, notice to the other party to the judgment would be essential to the validity of any order of the Nevada court changing, amending, modifying or correcting its original judgment in the divorce proceeding. Indeed, with rare and immaterial exceptions, jurisdictional infirmities are the only justification for the refusal of one State to accord full faith and credit to the judgment of another State.

Morris v. *Jones*, 329 U.S. 545;
Magnolia Petroleum Co. v. *Hunt*,
320 U.S. 430.

If we had a corrected, amended or modified judgment of the Nevada court, we should not be here. We earnestly insist, however, that the Nevada judgment invoked here has not been given full effect according to its legal inter-

pretation. Our quarrel with the Oklahoma Supreme Court and the gist of our contentions here, is that the Oklahoma Supreme Court has placed a construction upon the Nevada judgment, contrary to the interpretation of the Nevada court, the effect of which is to deny full faith and credit to that judgment.

While the question whether notice is a prerequisite to the jurisdiction of the court is a matter of state law upon which the word of the state court is final, whether it be Oklahoma or Nevada law, the construction of the judgment for the purpose of determining whether the state denied full faith and credit is a matter of Supreme law, of which this Court is the final arbiter.

See:

Norris v. *Alabama*, 294 U.S. 587;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U.S. 737;

Aetna Life Ins. Co. v. *Dunkin*, 266 U.S. 379.

When this judgment was interposed as a defense in the former proceedings, the trial court accepted it as valid upon its face and as a valid and subsisting judgment of a sister state, and construed it in accordance with its journal entry — the only evidence of the Nevada court's judgment. On appeal, the Supreme Court of Oklahoma also accepted the Nevada judgment as valid and subsisting but placed a different interpretation upon the legal effect of the journal entry. *Allen* v. *Allen*, 162 Pac.(2d) 193. When the Nevada court's attention was called to the interpretation

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placed upon its judgment by the Oklahoma Supreme Court, it entered what is denominated a *nunc pro tunc* order, the purpose of which was not to change, modify or amend the judgment in any manner whatsoever, but to make the journal entry of its judgment speak the true judgment it had rendered in the divorce proceedings (See dissenting opinion, Tr. 172). It was not asked to change, modify or amend the judgment in any respect and it did not do so, and the rights of the parties remained unchanged.

When it was called to the Nevada court's attention that the journal entry did not reflect the true judgment it had rendered in the divorce proceedings, it not only had the power, but the duty to enter the *nunc pro tunc* order, reflecting the judicial action it had actually taken in the divorce proceedings.

In re: Wight, 134 U.S. 136;
Groton Bridge & Mfg. Co. v. *Clark Pressed Brick Co.*, 136 Fed. 26;
Freeman on Judgments, Fifth Edition, Sections 121, 126;
Lindsay v. *Lindsay*, 280 Pac. 95;
Silva v. *Second Judicial Dist. Court*, 66 Pac.(2d) 422;
Martin v. *Ray*, 170 Pac.(2d) 75;
Hughes v. *Hughes*, 168 Pac.(2d) 429;
Morse v. *Morse*, 154 Pac.(2d) 982;
Bush v. *Bush*, 150 Pac.(2d) 168;
Bastajean v. *Brown*, 120 Pac.(2d) 9;
Hobson v. *Dempsey Const. Co.*, 7 N.W.(2d) 9;
Benway v. *Benway*, 159 Pac.(2d) 682;
Gottwals v. *Rencher*, 98 Pac.(2d) 481;

Annotation, 67 A.L.R. 828, and as supplemented in 126 A.L.R. 956;

Cf. *Finlay* v. *Finlay*, 189 Pac. (2d 334.

The *nunc pro tunc* order merely confirms the Nevada court's judgment in the divorce proceedings, by which respondent was already bound. It impaired none of her rights as established by the judgment in the divorce proceedings, nor did it foreclose any defense she had not had an opportunity to offer when she was before the Nevada court, nor did it deprive her of the right to sue on the judgment for its full enforcement in our Oklahoma courts. Thus, it is manifestly plain that the order *nunc pro tunc* was not an amended, modified or changed judgment; that the rights of the parties remained the same, and this Court has held that notice under these circumstances is not a prerequisite to jurisdiction.

Griffin v. *Griffin*, 327 U.S. 230, 233, 234.

It is clear beyond doubt that the Oklahoma Supreme court has misconceived the legal nature of the *nunc pro tunc* order and in so doing had denied full faith and credit to a judgment, the validity of which it has recognized throughout the course of this litigation, and does not now challenge.

To summarize, we have a Nevada judgment receiving one interpretation in Oklahoma and another in the Nevada court which rendered it, the effect of which is to deny it full faith and credit on the grounds that it is void under Nevada law. We have been unable to find a comparable

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factual situation in any of the adjudicated cases. We are certain, however, that a serious and anomalous situation arises under the Full Faith and Credit Clause of the Federal Constitution and this Court should in all events take jurisdiction for the purpose of resolving the question.

We therefore respectfully submit that the Oklahoma court cannot give the Nevada judgment an interpretation contrary to that of the court which rendered it, and then under the guise of Oklahoma law justify its failure to give full faith and credit to it. The Nevada court having had jurisdiction of the parties and the subject matter when the decree of divorce was granted, and the order *nunc pro tunc* being merely a restatement of that decree, the Oklahoma courts must give it full faith and credit.

See:

Davis v. *Davis*, 305 U.S. 32;
Sherrer v. *Sherrer*, 334 U.S. 343;
Coe v. *Coe*, 334 U.S. 378;
Estin v. *Estin*, 334 U.S. 541.

The Judgment of the Oklahoma courts recognizes and seeks to enforce a void contract, thus depriving petitioner of his property without due process of law.

The parties had entered into a prior separation agreement which was outstanding and effective on the date the disputed contract was signed by the parties. The disputed contract contained the following provision:

"Now, therefore, without in any manner affecting the said prior agreement (unless and until a divorce decree is entered dissolving the marriage between the

parties thereto within three months from this day), the parties hereto agree as follows:

* * * * *

"7th. This agreement shall be incorporated in the decree of divorce if and when the same is entered in the proceeding about to be instituted by the husband."

The Oklahoma Supreme Court in *Allen* v. *Allen*, 162 Pac. (2d) 193, held that this disputed contract was not incorporated into the after-acquired divorce decree. Upon the face of the contract clearly it was the intention of the parties that the prior agreement remain in full force and effect until the disputed contract was incorporated in the decree of divorce. Inasmuch as the Oklahoma Supreme Court has said in *Allen* v. *Allen, supra*, that such contract was not incorporated in the Nevada divorce decree, the condition to validate the contract never happened, and thus this contract is void and unenforcible, leaving in full force and effect only the prior agreement. Therefore, permitting recovery on this void contract is in contravention of the "due process clause" of the Federal Constitution.

As a matter of fairness, may we say that in *Allen* v. *Allen, supra*, we urged that the disputed contract, the one which we maintain here is void, was incorporated into and made a part of the divorce decree, but in this contention we were overruled by the Oklahoma Supreme Court. The acceptance of jurisdiction and the enforcement of a void contract by the Oklahoma court does not accord petitioner the "due process of law" contemplated by the Federal Constitution.

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CONCLUSION

We therefore respectfully submit that the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

LYNN ADAMS,
ROBERT E. SHELTON,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

MARCH 4, 1949.